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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 475

ROBERT ELMER GALLEGOS, Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

ANSWER BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE

Between 8:30 and 9 P. M. on December 20, 1958, while defendant, then fourteen years old, and two other boys were shining shoes in downtown Denver, they thought of a plan to rob an old man. He was partially drunk and they followed him to a hotel. After the man entered the hotel, the three boys followed, but left one by the door to act as a lookout. Defendant and the other boy then went upstairs and, since they had lost track of the old man, they asked several people if their grandfather had

just come in and what room he had entered. They were told that the old man next door had just come in, so they knocked at the indicated door. The boy with defendant asked for a drink of water and, when the old man either brought the water or turned to get it, the other boy grabbed him and defendant hit him with a shoe brush. When the old man fell to the floor, the boys held a knife to his throat and took his wallet. The two boys then ran down the stairs, picked up the lookout at the door, and all three ran on to a viaduct. There they split up $13.00 found in the wallet and threw away the billfold and the shoe brush.

On the evening of January 1, 1959, defendant was questioned by Officer Chism, who had a record of the assault and a description of the suspects. Defendant immediately admitted his part in the crime. He was then booked in at Juvenile Hall and the next day he once again confessed and, except for the date, gave all of the details of the offense as related above (R. 116-118, 195-199). Then on January 7, 1959, he signed a complete statement, in which he repeated once again the account of how he and the other boys had beat the old man and taken his money, and affirmed the date as December 20, 1958 (R. 208-217).

Almost immediately after the attack, the victim was taken to the hospital. An examination made upon his arrival showed two fractures in the front part of his jaw, one in the rear, a cut on his neck, and another bruise on his jaw. Four days after the victim entered the hospital he became unconscious and was examined again. Several blood clots were found which were "secondary" to the blows he had received on the head and there was also evi-

dence of severe blows on the jaw. In spite of various medications and surgery, the victim did not respond to treatment and died on January 26, 1959, of brain injuries. The death certificate in this case lists bronchial pneumonia as the cause of death, but the doctor involved and the coroner's pathologist actually felt that the bronchial pneumonia was a secondary cause of death, and that it was more correct to say that the victim died of brain injuries which lead to bronchial pneumonia (R. 84-113).

All of the above evidence was brought out during the People's case. In a hearing out of the presence of the jury to determine if defendant's confessions were voluntary, defendant denied any participation in the offense and denied ever making any oral admissions. The written confession, he claimed, was forced out of him (R. 156-165). During the defense case, defendant did not take the stand, but presented several witnesses in order to establish an alibi. These witnesses all claimed that defendant and the other two boys supposedly involved in the assault were all in the home of one of those boys the entire evening, from seven o'clock on watching television (R. 226-246). Defendant also presented the testimony of the court psychologist of the Denver Juvenile Court. It was his opinion that the fourteen year old defendant in this case had an IQ of seventy so far as his ability to communicate is concerned, which means that he has the language ability of an average eight or nine year old. He went on to say that the defendant has feelings of insecurity and inadequacy and of being retarded, but that his over all IQ was 83, equal to that of the average ten or eleven year old (R. 263-271). Prior to the time that the victim of the involved assault died, defendant had been brought before juvenile court for his part in the assault and had been committed

on January 15, 1959, to the State Industrial School at Golden, Colorado (R. 18-25).

Though the defendant pleaded not guilty, the jury returned a verdict of guilty of first degree murder on June 19, 1959, and sentenced defendant to life imprisonment (R. 36, 57, 304). A motion for a new trial was made and denied. On August 18, 1959, the court sentenced the defendant in accordance with the verdict of the jury (R. 63, 311). On December 19, 1960, the trial court's judgment was affirmed by the Supreme Court of Colorado (R. 314-324).

ARGUMENT

I.

DEFENDANT'S CONFESSION WAS PROPERLY ADMITTED INTO EVIDENCE BY THE TRIAL COURT.

In order to understand our position regarding defendant's confession and the lack of any coercion in obtaining it, we must point out a series of events leading up to the giving of that confession.

The prosecution's evidence showed that on January 1, 1959, an officer picked up both defendant and his nine-year old brother at about 8 P. M. in downtown Denver, Colorado (R. 115-116, 121). Right there in the officer's automobile the two were first interrogated about the crime here involved and they immediately admitted their involvement (R. 115-116, 120-121, 205-206). They were then taken to Juvenile Hall and the next day both defendant and his brother Richard again admitted this offense and gave all

the details thereof, and also admitted another similar offense (R. 116-118, 122, 197-199). About 8:30 P. M. on January 2, 1959, all of the boys involved gave a complete account of the crime they had committed and defendant himself gave a complete confession as to all of the details while the officer recorded the information in longhand (R. 121-126, 197-199).

During the time defendant was held in Juvenile Hall, after that, he was kept in security, which means he was in a room by himself, but allowed to eat with other inmates (R. 211). He was told he could see his parents and or an attorney, but he requested neither at any time while in confinement (R. 139, 147, 211). On January 7, 1959, defendant signed a written statement containing the same details to which he had twice previously confessed orally (R. 208-217).

The first night the defendant was picked up, his mother was advised where he was, how serious the matter was, that defendant could have an attorney, and that visiting hours were 7 to 8 P. M. on Monday and Thursday (R. 134-136, 204, 224). That was on a Thursday night. Mrs. Gallegos tried to see her son on the second of January, which was a Friday night, and was again advised she could see him on visiting hours on Monday and Thursday nights (R. 223). The next time Mrs. Gallegos tried to see her son was on the following Thursday, January 8th, and that time she succeeded (R. 225).

In defendant's brief, the next to the last paragraph on page 11 makes several sweeping statements which are either incorrect or misleading, or both, and should be cleared up prior to proceeding with this argument.

(a) *Defendant was kept in "solitary confinement".* The brief nowhere defines solitary confinement. However, the record is undisputed to the effect that defendant was kept in a room by himself and was allowed to eat with the other juveniles then in custody. This is hardly solitary confinement in the usual sense of the word.

(b) The next part of defendant's brief says that *defendant was held "for a period of 5 days and until the written statement was secured."* We have already shown that defendant confessed to this crime immediately upon being arrested; he was then held for investigation of this and another similar crime, and a written statement was obtained from him before he was released. However, since he confessed to the crime here involved immediately upon his arrest, it is misleading to imply that he was held in solitary confinement for a period of five days in order to force him to confess to anything.

(c) *"This 14 year old boy was of the mental age of eight."* There is absolutely nothing in the record to substantiate this statement and we consider it a breach of ethics on the part of counsel to present such a statement to this Court. Pages 265 and 266 show that the psychologist called at the trial by defendant himself stated that, although "he speaks the language of a child you might expect at eight or nine * * * I would say he is probably functioning at the level one might expect of a normal child of eleven, maybe ten."

(d) *"Defendant did not have the benefit of counsel."* We have already pointed out that defendant's mother was informed he could have counsel and defendant himself

was offered and rejected the aid of counsel while he was in confinement.

(c) *Defendant was a "Spanish-speaking child."* This we consider perhaps the most unsubstantiated and unethical statement in the entire brief. There is absolutely nothing in the record before us to support this. On the contrary, the record is replete with discussions of defendant's having been interviewed by various police officers and having been able to "read good" a statement in English set before him (R. 128-130). As a matter of fact, during the course of the trial he even took the witness stand out of the presence of the jury to testify regarding the conditions of his confinement in Juvenile Hall. At no point is there any reference to any interpreter ever being used. Not one of the police officers mentioned that there was any language barrier between themselves and the defendant. On what basis it can be claimed that defendant "was a Spanish-speaking child" we do not know. It is obvious from the record that defendant speaks English very well. His answers during the time he testified before the court (outside the presence of the jury) will show that. If he speaks any other language, there is no revelation of that fact anywhere before us.

Thus, it can be seen that much of the proffered basis for defendant's position here, far from being supported by the record, is completely refuted by the record.

Defendant next goes on to cite many cases from both federal and state courts, to the effect that any confession which results from coercion must be considered unreliable and, therefore, is inadmissible in court. We have no quarrel with any of those cases, although we cannot help but note that many of them concern situations where an ac-

cused was subjected to far greater physical and mental coercion while in confinement than was the present defendant. However, it is our position that none of those cases apply to our fact situation because they all discuss a confession which was obtained subsequent to and as the result of coersive forces exerted on the accused during his confinement. None of them discuss a situation such as ours where the defendant at the moment of his arrest and before he was subjected to any confinement or any pressure of any kind, immediately sat in the police car with the officer and confessed his involvement in the crime involved. Defendant appears to admit in his brief that none of these forces which he claims were exerted upon the defendant were even begun until after the night of January 2, 1959. By that time, defendant had not only made his initial confession upon his arrest, but had also made another and much more detailed oral confession of both the crime involved here and of another similar incident. This court has held numerous times that, if a first confession was involuntary, any subsequent confession if closely connected in time and place, and if the defendant was still under the same or similar coersive forces, will also be assumed to have been involuntary. 4 Federal Digest, Cum. Supp., 273, Criminal Law, Sec. 519(2). However, it has been held elsewhere that the converse is also true, and that, therefore, if the first confession is voluntary, it is assumed that any later ones are also voluntary in spite of intervening claimed coersive forces.

> "Of (defendant's) several confessions, his first is the controlling one, the presumption being that the repetition of a confession is the product of the same circumstances which produced the original one."
>
> *People v. Latasco*, 406 Ill. 303, 94 N. E. (2d) 178.

It is true, of course, that in the hearing out of the presence of the jury defendant denied ever having confessed either at the time he was first picked up or the next day, and claimed that the subsequent written confession five days later was forced out of him. However, the court made its ruling that these oral confessions, which the police officers said they heard defendant make, prior to any claimed "solitary confinement" could be and were presented to the jury for their consideration. We believe the trial court was well founded in this decision. Surely, it seems logical that any confessions at all made by an accused immediately upon his arrest must be voluntarily given because of an inward desire to confess, and not because of any claimed pressures exerted upon him during subsequent confinement. And, if those were voluntary, the logical reasoning of the case cited above would support a finding that the confession of the same crime five days later, after the intervening confinement, was also free and voluntary.

As to defendant's other minor points involving his age, his being away from his parents, and his lack of counsel, all of these are well answered by the following quotation, which to a large extent summarizes our position on this matter:

> "Appellant's principal argument that defendant's first and second written confessions were coerced stems from the fact that the confessions were made to police officers, that the defendant was then only 16 years old, was 1,200 miles from home, was dirty, tired and nervous, in an upset emotional state and without counsel. The fact that a confession is made while a prisoner is in the custody of armed police officers

will not render it involuntary. Commonwealth v. Jones, 341 Pa. 541, 548, 19 A. 2d 389, nor is a confession invalidated because the accused was not represented by counsel, no request for such representation having been made. Commonwealth v. Bryant, 367 Pa. 135, 145, 79 A. 2d 193. Appellant's youth, distance from home and nervous condition at the time he made his first written confession does not of itself render the confession inadmissible, particularly where the confession is corroborated by other evidence. Cf. Commonwealth v. Cavalier, 284 Pa. 311, 131 A. 229. These are facts to be taken into consideration by the jury in determining whether or not the confessions were voluntary and the jury was so instructed by the court in its charge. See Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161."

Commonwealth v. Smith, 374 Pa. 220, 97 A. (2d) 25, 32.

II.

NO COURT-APPOINTED PSYCHIATRIST WAS EVER CALLED TO TESTIFY AGAINST THE DEFENDANT.

Pages 15 and 16 of defendant's brief elaborately argue that it is a denial of equal rights for the court to allow testimony from a court-appointed psychiatrist who examined the defendant prior to the defendant's having entered any plea. His main basis for this argument appears to be that such a procedure denies equal rights to rich and poor because a person of means would have and could have hired his own personal psychiatrist, rather than be examined by one appointed by the court, and his own personal psychiatrist would have been forbidden by

the well-recognized doctor-patient relationship from revealing any fact learned in the course of a psychiatric examination.

Defendant raised this same point at the time this case was before the Supreme Court of Colorado and again in his petition for certiorari before this court. We answered in both those cases, and we answer again here, that we are unable to find in the record any testimony from any of the doctors here involved regarding defendant, and therefore we fail to understand the relevancy of this point to the case before us. It is noted that nowhere on pages 15 and 16, where defendant's brief argues this point, is there one reference to a single page in the printed record. In his "abstractions" on page 9 of his brief, defendant does point out that at his request the trial court appointed three doctors to examine defendant prior to his plea (R. 11). Later, each of the three doctors *reported* to the Court *by letter. They did not testify.* The letters showed that one found the defendant incapable of adhering to the right, but the other two failed to come to that conclusion and found defendant sane (R. 12-14). The court did say it would allow the doctors to testify on the ability of the three defendants then on trial to distinguish between right and wrong, and to understand an oath. But the two of the doctors who did testify did so only as to Martinez' ability in this regard (not defendant's) and to Martinez' ability to understand the meaning of an oath (R. 169-177). The case was then dismissed as to Martinez (R. 191). The record's index (R. I to VI) shows no other appearances by any of the three doctors, and we have been unable to find such appearances after searching the record three times. In spite of seemingly contrary earlier rulings, later in the trial the court specifically ruled that it would not

allow testimony by these doctors (R. 218-219). None was ever received, and we are at a complete loss to understand how this defendant can complain of error because of the calling of three psychiatrists when not even one ever appeared to give one word of testimony relative to him.

III.

COLORADO'S INTERPRETATION OF ITS OWN JUVENILE DELINQUENT STATUTE DENIED DEFENDANT NO CONSTITUTIONAL RIGHTS.

Defendant points out that the Colorado statute on the matter says that evidence given in a juvenile court proceeding shall not be used against a child in a later criminal proceeding. In this case, defendant was first adjudged to be a juvenile delinquent based upon the robbery of the victim in this case, and then later defendant was criminally prosecuted for murder after the victim in this case had died. Much of the same evidence was used in both of these proceedings, but the Colorado Supreme Court ruled, in effect, that the prohibition was against using evidence made known for the first time in the juvenile court proceeding. In other words, a transcript of the juvenile court proceeding could not later be used in a criminal prosecution against the same child, but a confession obtained prior to either proceeding could be used in both. It is our position that such interpretation by the Colorado Supreme Court is well founded under the reasoning presented in that court's opinion (R. 321-322). It is further noted that the very first part of Colorado's Juvenile Court Act says that that statute applies only to persons who are not inmates of the Colorado State Industrial School for Boys. Since defendant was an inmate of that institution

at the time he now claims he was denied the protection of that statute, it is obvious that he was not even within the group of persons covered by the statute. We also wish to point out that the United States Supreme Court generally requires a federal question to be presented, as such, in the trial court before it is worthy of consideration here (See cases and notes collected in 36 C. J. S. 748, et seq., 762, et seq.). It is our position that, even if defendant were right in all of his assertions, we fail to see how any federal constitutional right has been denied by this interpretation of this statute, and we fail to see in the record where defendant, in either the trial court or the Colorado Supreme Court, even called it a federal constitutional question or attempted to have it decided in that light (R. 47-48). Obviously, this is merely a matter of a state supreme court interpreting its own state's statute. No federal question is even involved. In the circumstances, the question, we feel, is not entitled to review here.

IV.

NO FEDERAL CONSTITUTIONAL RIGHT WAS DENIED TO THE DEFENDANT WHEN THE LOWER COURT REFUSED TO ALLOW HIM TO WAIVE A JURY TRIAL.

Prior to this case, Colorado had held that a jury must be present in every murder case to decide the degree of murder involved and the possible penalty.

Graham v. People, 134 Colo. 290, 302 P. (2d) 737;
Mansell v. People, 122 Colo. 420, 222 P. (2d) 615.

Therefore, when defendant requested that a jury be waived in this case, the lower court, of course, denied the motion.

Defendant now claims that, since defendant was not of the minimum age necessary to receive the death penalty in Colorado, there was nothing for the jury to decide and his request to be tried by the court alone should have been granted. This reasoning revolves around the fact that whenever a defendant in Colorado is convicted of first degree murder, *and is over eighteen*, the jury must decide between the death penalty and life imprisonment. If under eighteen, as here, life imprisonment is the only possible penalty. However, defendant completely ignores the fact that the jury must also decide the degree of murder because the accused could be convicted of only second degree murder, and then the penalty is ten years to life, regardless of age. The court, of course, at the start of the trial had no way of knowing how many degrees of murder or manslaughter might be submitted to the jury on the evidence that would later be presented. (At the close of the trial, defendant requested instructions on all degrees of murder and manslaughter). In those circumstances, the jury had to be held whether defendant wanted it or not.

Colorado is not alone in its decision to refuse to allow jury waiver in some cases.

> "At common law an accused in a felony case could not waive his right to a jury trial."
>
> 50 C. J. S. 792.

Many states are still of the opinion that a defendant is not always entitled to waive a jury trial in certain cases or in certain classes of cases.

> *State v. Christensen*, 166 Kan. 152, 199 P. (2d) 475;
> *Gutierrez v. First Judicial District*, 52 N. M. 28, 191 P. (2d) 334;

State v. Harper, 235 N. C. 62, 69 S. E. (2d) 161;
Berge v. State, 168 Tex. Cr. 515, 330 S. W. (2d) 195;
State v. Pondolfo, ... N. D. ....., 98 N. W. (2d) 161;
Alldredge v. State, 239 Ind. 256, 156 N. E. (2d) 888;
Tackett v. Com., ... Ky. ....., 320 S. W. (2d) 299;
Scaiber v. State, ... Ark. ....., 291 S. W. (2d) 241;
State v. Scalise, 131 Mont. 238, 309 P. (2d) 1010;
Com. v. Taylor, 193 Pa. Super. 386, 165 A. (2d) 134;
Corder v. Cochran, ... Fla. ....., 123 So. (2d) 249 (appeal pending to U. S. Supreme Court);
Jones v. State, 206 Tenn. 245, 332 S. W. (2d) 662.

And, although defendant points out that federal courts allow the waiver of a jury trial, he fails to point out that even there such waiver must be approved by the court and consented to by the government.

Hasan v. U. S., 250 F. (2d) 704.

CONCLUSION

Our position before this Court can best be summarized by quoting the concluding paragraph of the opinion rendered by the Supreme Court of Colorado. We believe that Court's sentiments on the matter are equally applicable here (R. 324):

> "Much of what has been argued in this court might carry substantial weight if presented in connection with an application to the Governor for commutation of sentence or other relief by way of executive clemency. It is not the function of this court to reverse a judgment entered in a criminal case following a trial conducted, in all material respects, in harmony with the legal principles applicable thereto, even though

as a result of said trial a fourteen year old boy is sentenced to imprisonment for life. The defendant had a fair trial under the applicable legal principles. It is our duty to affirm the judgment, and it accordingly is affirmed."

Respectfully submitted,

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